SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-995

VINCENT ANTHONY CIRAOLO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dated: February 14, 1975

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The Petitioner, Vincent Anthony Ciraolo, prays that a Writ of Certiorari issue to review the judgment entered on January 16, 1975 by the United States Court of Appeals for the Fifth Circuit in the proceeding entitled *Vincent Anthony Ciraolo,* Petitioner-Appellant, v. *United States of America,* Respondent-Appellee, Docket No. 74-1327.

Judgment Below

The Court of Appeals for the Fifth Circuit wrote no opinion. Its judgment appears at Appendix page A-1.

Jurisdiction

The judgment of the Court of Appeals was entered on January 16, 1975. The jurisdiction of this Court is invoked under Title 18, United States Code, Section 1254(1).

Questions Presented

1. Whether Petitioner's representation at trial and on direct appeal by an attorney who was concededly suffering "mental stress" throughout the time he represented Petitioner and who failed to make any objection at all, either at trial or on direct appeal, to the introduction against Petitioner of extremely prejudicial, obviously unlawful evidence, constituted a denial of the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution?

2. Whether Petitioner was improperly denied a hearing on contested issues of fact in the Motion which he brought under Title 28, United States Code, Section 2255 to vacate his conviction and sentence on grounds of deprivation of Sixth Amendment rights?

Constitutional Provision Involved

United States Constitution, Amendment VI, states as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accu-

sation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Statutes Involved

Title 28, United States Code, Section 2255 states in pertinent part as follows:

> "Unless the motion and the files and records of the case conclusively show that a prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a

final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

Statement of the Case

Petitioner, Vincent Anthony Ciraolo, was convicted by a jury on April 16, 1972 in the United States District Court for the Southern District of Florida on a charge of conspiracy to distribute and unlawful distribution of counterfeit currency, in violation of Title 18, United States Code, Sections 371, 472, 473 and 2. On that date, Petitioner was sentenced to a term of sixteen years in prison.

On January 9, 1973, Petitioner Ciraolo's conviction was affirmed on direct appeal, see *United States* v. *Curry, et al.*, 471 F.2d 419 (5th Cir., 1973), and on May 7, 1973, this Court denied Petitioner's petition for a Writ of Certiorari.

On March 12, 1974, Petitioner moved pursuant to Title 28, United States Code, Section 2255 to vacate his conviction and sentence on the ground that he had not had the effective assistance of counsel at trial. On May 14, 1974, the District Court for the Southern District of Florida denied the relief sought without an evidentiary hearing.

(A 14)* On January 16, 1975, the Court of Appeals for the Fifth Circuit upheld the District Court's decision.

Petitioner's Section 2255 Motion in the District Court was based upon some extraordinary, highly prejudicial conduct by his own attorney at the trial, coupled with a post-trial affidavit provided by his trial counsel in which the attorney, who is now a sitting judge, stated that while he was representing Petitioner, he

> ". . . was undergoing mental stress brought about by a pending dissolution of marriage and the loss of [his] children."

The attorney went on to concede that:

> "The representation that I gave on behalf of [Petitioner] may not have been of the calibre of my usual practice, due to this mental stress." (A 7)

The extreme consequences of the attorney's impaired condition are evident on examination of the trial record. With the exception of the testimony of a single accomplice, the only evidence linking Petitioner to the counterfeit currency scheme was the testimony of a Secret Service agent who arrested Petitioner and then seized from his person a slip of paper bearing the name and address of a place to which the Government proved that counterfeit money was to be delivered.

At a suppression hearing brought on not by Petitioner's attorney, but by co-defendants, held the morning trial began, it developed that the *only* information about Petitioner which formed the basis for his arrest and incidental search

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* References to "A" and "T" are to Petitioner's Appendix filed with the Court of Appeals for the Fifth Circuit and to the trial transcript, likewise filed respectively.

was the same agent's observation of a thirty-second conversation, on its face utterly innocent, between Petitioner and a known participant in the counterfeiting scheme, which took place on a street a few minutes prior to the nearby arrest of Petitioner's co-defendants and seizure from them of counterfeit currency. (T 81-99)*

With no argument whatsoever to the contrary from Petitioner's attorney, the Trial Court ruled that Petitioner's arrest, and hence the seizure of the slip of paper from him, was lawful. (T 161) Later at the trial, when the slip of paper was offered into evidence, Petitioner's attorney made no objection whatsoever, but then, weirdly, devoted his entire cross-examination of the agent to questions relating to the basis for the arrest! (T 391-399) Finally, when Petitioner was convicted and appealed his conviction to the Fifth Circuit Court of Appeals, Petitioner's same attorney did not even raise any issue of illegal arrest and search.

Reasons for Granting the Writ

The facts outlined above demonstrate that Petitioner was, in practical effect, *without any counsel whatsoever* in responding to the introduction against him of plainly

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* After this conversation, at a time when Secret Service agents entered the building where the counterfeit money was seized, Petitioner was seen by the arresting agent to "walk hurriedly" toward a phone booth in what the agent described as a "nonchalant trot." (T 94-95) However, there was obviously nothing sinister in this since the agent testified that it was the *conversation* between Petitioner and the known counterfeit dealer which caused the agent to "assume" that he had probable cause to arrest the Petitioner. (T 90) The bald error of the agent's arrest and search of the Petitioner is most dramatically shown by the agent's testimony that he would have arrested *anyone* whom the accomplice had been seen talking to on the street near the building where the counterfeit money was later found. (T 396)

unlawful evidence in a case in which that evidence was obviously critical to the Government's case. We urge that this Court review this case simply because the Court of Appeals' offhanded rejection of Petitioner's Sixth Amendment claim constituted an utterly erroneous and, in this case, obviously prejudicial deprivation of a major constitutional right. See, e.g., *Moore* v. *Michigan*, 355 U.S. 155 (1957); *De Meerleer* v. *Michigan*, 329 U.S. 663 (1947); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Crooker* v. *California*, 357 U.S. 433 (1958); *Cicenia* v. *La Gay*, 357 U.S. 504 (1958).

Alternatively, the District Court committed obvious error in not at the least affording Petitioner the right to a hearing. Section 2255 of Title 18 provides that a prisoner is entitled to a "prompt hearing" on his Motion unless the files and records "*conclusively* show that the prisoner is entitled to no relief." (Emphasis added) In this case, the record itself showed the opposite. The only conceivable response to Petitioner's claim was that his attorney might have failed to object to the evidence out of some misguided tactical judgment; see, e.g., *United States* v. *Rodriguez*, 498 F.2d 309-10 (5th Cir., 1947). However unlikely an explanation that might be for such egregious conduct, Petitioner was, at a minimum, entitled to examine the attorney under oath at a hearing to demonstrate conclusively that his fatal inaction had resulted from his strained mental condition and not from tactical error. See, *Commonwealth* v. *Claudy*, 350 U.S. 116 (1956); *United States* v. *Hayman*, 342 U.S. 205 (1952). Compare, e.g., *Cochran* v. *Kansas*, 316 U.S. 255 (1942).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Dated: February 14, 1975

Respectfully submitted,

GERALD L. SHARGEL
Attorney for Petitioner
Vincent Anthony Ciraolo

LA ROSSA, SHARGEL & FISCHETTI
of Counsel

Judgment of the United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-2613

SUMMARY CALENDAR *

—o—

VINCENT ANTHONY CIRAOLO,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

—o—

[January 16, 1975]

Before:

COLEMAN, DYER, and RONEY, *Circuit Judges.*

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See NLRB v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-995

VINCENT ANTHONY CIRAOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this collateral attack on his conviction, petitioner contends that he was deprived of effective assistance of counsel at trial and that the district court erred in denying his motion for relief under 28 U.S.C. 2255 without an evidentiary hearing.

On March 14, 1972, following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to distribute and two counts of unlawful distribution of counterfeit currency in violation of 18 U.S.C. 371, 472, 473, and 2. He was sentenced to five years' imprisonment on the conspiracy count, a consecutive term of eleven years' imprisonment on one of the distribution counts, and a term of ten years' imprisonment on the third count, to be served concurrently with the sentences on the first two counts. The court of appeals affirmed the conviction, 471 F.2d 419 (C.A. 5), and this Court denied certiorari, 411 U.S. 967.

On March 12, 1974, petitioner moved under 28 U.S.C. 2255 to vacate his conviction on the ground that he had been denied the effective assistance of counsel at trial. The United States District Court for the Southern District of Florida denied the motion without a hearing. The court of appeals affirmed without opinion (Pet. App. A).

Petitioner was indicted with three co-defendants. Prior to trial, co-defendant Julian Wilkerson pleaded guilty to the conspiracy charge; he testified as a government witness.[1] The facts at trial revealed a counterfeit currency transaction in which undercover Secret Service agents negotiated with some of petitioner's co-defendants for the purchase of $100,000 in counterfeit currency. An agreement was reached, and delivery of the currency commenced on February 2, 1972, at the Fort Lauderdale International Airport, where petitioner delivered a brief case containing $40,000 in counterfeit bills to Wilkerson (Tr. 240-241).[2] Both men then drove in separate automobiles to the prearranged location for the transfer, co-defendant Otis T. Curry's bail bond office, which was under surveillance by government agents.

Wilkerson entered Curry's office, while petitioner stood across the street. Upon discovering only $40,000 in the brief case, Wilkerson left the office to hold a brief conversation with petitioner, which was observed by three agents (Tr. 372-373, 385-387, 418-421). Wilkerson testified that at that time he inquired about the delivery date of the missing $60,000 in counterfeit currency (Tr. 244-

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[1]Co-defendants Curry and Siano were tried with petitioner and were also convicted on all counts of the indictment.

[2]Although the planned transaction was to total $100,000, only $40,000 was delivered and seized.

245). Shortly after Wilkerson reentered the office, and upon an undercover agent's predetermined signal, six agents converged upon Curry's office to assist in the arrests. Agent James, who had witnessed Wilkerson's conversation with petitioner, observed petitioner turn and walk hurriedly away from the office (Tr. 387). He then arrested and searched petitioner, discovering $2,000 in genuine currency and a slip of paper bearing the words "Suter-Curry" and the address of the Suter-Curry bail bond office, where the transaction occurred (Tr. 387-389). This slip of paper was introduced at trial without objection except as to relevancy from petitioner's counsel (Tr. 388-389).

1. Petitioner contends that his trial counsel's failure to pursue a motion to suppress more vigorously or to object to the introduction of the document containing co-defendant Curry's name and address denied him the effective assistance of counsel.

Effective counsel does not mean perfect counsel, but only reasonably competent counsel rendering reasonably effective assistance. See, *e.g.*, *McMann* v. *Richardson*, 397 U.S. 759, 771; *Herring* v. *Estelle*, 491 F.2d 125 (C.A. 5). Thus, counsel does not render ineffective assistance because he chooses not to request suppression of evidence, particularly when his decision is a reasonable trial tactic. *United States* v. *Meyer*, 417 F.2d 1020, 1024 (C.A. 8). Here, petitioner's counsel chose to portray him as an innocent wig salesman who thought he was delivering a shipment of wigs to co-defendant Curry, who was also a wig salesman. This strategy is disclosed in counsel's questioning of Wilkerson (Tr. 308-310) and again in his closing argument (Tr. 606-607). In this context, it was reasonable for petitioner to possess the address of Curry's office, from which wigs were sold.

With this trial strategy in mind, counsel apparently decided not to object to the introduction of the document removed from petitioner after arrest, choosing instead to contest its relevance.[3] The wisdom of this trial strategy is underscored by the fact that such an objection manifestly could not have succeeded, since ample probable cause supported petitioner's arrest. Moreover, even had the document been suppressed, Wilkerson's testimony concerning petitioner's participation in the conspiracy and the testimony of government agents concerning petitioner's conversation with Wilkerson shortly before the arrests provided sufficient evidence to support the jury's verdict. Petitioner may not now complain simply because his trial counsel's strategy was not successful. See, *e.g.*, *United States* v. *Hayes,* 444 F. 2d 472, 475 (C.A. 5), certiorari denied, 404 U.S. 882. In short, viewing the record as a whole, the decision of defense counsel to abandon the motion for suppression and allow the document removed from petitioner after arrest to be introduced without objection did not deprive petitioner of the effective assistance of counsel.

2. Petitioner contends that the trial court erred in denying his motion under 28 U.S.C. 2255 without an evidentiary hearing. However, Section 2255 does not require an evidentiary hearing if the motion is conclusively inadequate on its face or is shown to be inadequate by the files and records of the case. A motion is inadequate on its face if its basic claim is not supported by sufficient factual allegations. *Sanders* v. *United States,* 373 U.S. 1, 19. The

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[3]Upon introduction of the document, petitioner's counsel stated: (Tr. 389): "The defendant Ciraolo has no objection to this being introduced in evidence, and I would like to have the United States Attorney make some statement to show what the relevancy is in asking these questions, what the relevancy of it is in this case."

sufficiency of factual allegations may be determined by assuming *arguendo* their truth and then assessing their sufficiency in the light of relevant constitutional standards and the record. See *Moran* v. *Hogan*, 494 F.2d 1220 (C.A. 1). As discussed above, petitioner's factual allegations do not support a claim of ineffective assistance of counsel and thus fail to pass this threshhold test. His motion was therefore inadequate on its face.

Even assuming that petitioner's factual allegations adequately supported a claim of ineffective assistance of counsel, his allegations were nevertheless refuted by the record, which, as indicated above, shows that trial counsel's disputed decisions were motivated by a reasonable trial strategy (Tr. 308-310, 606-607). Thus, petitioner's motion was properly denied by the district court without a hearing. See, *e.g.*, *Hodges* v. *United States*, 368 U.S. 139, 140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

DOJ-1975-04